MOTION FILED
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(5)

No. 99-973

IN THE
Supreme Court of the United States

JOHN BAKER,
Petitioner,

v.

ANITA JOHN,
Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court Of The State Of Alaska

MOTION TO FILE OUT OF TIME AND FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF DRUE PEARCE, PRESIDENT OF THE ALASKA SENATE, AND BRIAN PORTER, SPEAKER OF THE ALASKA HOUSE OF REPRESENTATIVES, IN SUPPORT OF PETITIONER

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36pp.

MOTION TO FILE OUT OF TIME AND FOR LEAVE TO FILE AMICI CURIAE BRIEF

The movants, Drue Pearce, President of the Alaska Senate, and Brian Porter, Speaker of the Alaska House of Representatives ("Legislative Leadership"), in their official capacities, seek leave to file this *amici curiae* brief, out of time, because of the unique circumstances associated with the meeting times of the Alaska State Legislature. The Alaska State Legislature only convenes for a 120-day period each year. At other times of the year, the Legislators scatter to the four corners of Alaska and elsewhere. Meetings between legislators as a group when not in session is often impractical. This year, the Legislature did not convene until January 10, 2000, a few days after the January 6, 2000 deadline to file an *amici curiae* brief (or request for extension, Sup. Ct. R. 30.2).[1]

The Court should grant this motion to file out of time for four reasons. First, the Legislative Leadership did not want to take any action in this case until it had meet with other members of the Legislature, including in the caucuses most interested in this issue. The opportunity to do so did not come until after January 10, 2000. As soon as this consultation occurred, the Legislative Leadership instructed that counsel file these motions and brief as soon as possible.

Second, the Legislative Leadership, and the majority of the State Legislature they represent, has an unique interest in this proceeding. The Legislature considers and passes the state laws, specifically the state child custody laws, that are being essentially preempted by the so-called laws -- of the

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[1] This Court has granted motions to file out of time numerous times, although it is undoubtably not the routine practice. *See, e.g., American Foreign Serv. Ass'n. v. Garfinkel*, 489 U.S. 1050 (1989) (granting motion of U.S. Senate and of Speaker and Leadership Group); *Mansell v. Mansell*, 488 U.S. 906 (1988) (granting motion of U.S. Solicitor); *Livadas v. Aubry*, 511 U.S. 1028 (1994) (granting motion of Food Employers Council).

hundreds of Alaskan Native entities -- given life by the Alaska Supreme Court case under appeal here. For example, the Legislature passed Alaska Stat. § 25.20.060, which sets up a procedure for resolving child custody disputes, including the principles that should guide the Superior Court's decisions (e.g., the best interest of the child). This Section also addresses such issues as grandparent visitation (added in 1995), whether either parent is entitled to a preference in the award of custody, shared custody, and the effect of domestic violence on the issue (added in 1996). If the Alaska Supreme Court decision stands, the Legislative Leadership will have no means to ensure that the policies behind the Legislature's actions will apply to all citizens of Alaska.

Third, part of the impetus for the Legislative Leadership to file this brief is the fact that the State of Alaska, acting at the behest of the Governor and through its Attorney General, filed an *amicus curiae* brief in opposition to the Petition for Certiorari (i.e., a position diametrically opposed to the Legislative Leadership's position). The State's brief suggests that the government of the State of Alaska supports the Respondent and wants to uphold the Alaska Supreme Court's decision. But that brief represents the views of only one branch of the Alaska government. The State did not file its opposition brief until January 6, 2000, so the Leadership could not know that the State was going to file such a brief until that time. For the Court to hear the views of another branch of Alaska's government, it will have to grant this motion.

Fourth, the enclosed *amici curiae* brief is relatively short and essentially expresses the Leadership's support of the Petition for Certiorari. The brief informs the Court of the ramifications of the Alaska Supreme Court decision, if allowed to stand, particularly those effects on the Alaska Legislature. Allowing this brief to be filed out of time will not prejudice any party, as no party opposing the Petition for Certiorari would have seen this brief before having to file

their own briefs (they would have been due on the same day under Sup. Ct. R. 30.2).[2]

For these reasons, the Legislative Leadership respectfully asked that the Court grant leave to file this brief out of time.

For the same reasons as discussed above, the Legislative Leadership requests that this Court grant leave to file this *amici curiae* brief. *See* Sup. Ct. R. 37.2. The Petitioner consents to the filing of the Brief. See Letter from Donald C. Mitchell to Theodore W. Popely (January 21, 2000), App. 24a. The Respondent, however, apparently believes that this Court should have the views of only two of the three branches of the Alaska government (the Court through its opinion and the Governor through the State's *amici curiae* brief) and has refused consent. Thus, the Legislative Leadership seeks leave to file the following Brief.

The Legislative Leadership recognizes that such motions are disfavored. Sup. Ct. R. 37.2(b). But in this situation, the Court would benefit from hearing from all the branches of the Alaska government, notwithstanding the Respondent's desire to silence one of those voices. Especially considering that the following brief is relatively short and no party will suffer prejudice from the Court accepting this Brief, the Court should grant leave that this Brief be filed.

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[2] To avoid gaining an unfair advantage from filing after the Respondent's opposition brief was due, no attorney preparing this brief read the Respondent's opposition brief before preparing this Brief.

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AMICI CURIAE BRIEF OF DRUE PEARCE, PRESIDENT OF THE ALASKA SENATE, AND BRIAN PORTER, SPEAKER OF THE ALASKA HOUSE OF REPRESENTATIVES, IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici Curiae are the President of the Alaska State Senate and the Speaker of the House of Representatives of the Alaska Legislature (i.e., the Legislative Leadership of the State of Alaska).[3] Representing the majority of 20 Alaska Senators and 40 Representatives duly elected by all Alaska citizens, the Legislative Leadership represents the views of the majority of the Legislature. The Legislature has the duty under the Alaska Constitution to formulate and enact laws in the best interests of the State and its constituents.

Following the Alaska Supreme Court's decision in *John v. Baker*, 982 P.2d 738 (Alaska 1999), the case under review here, hundreds of Native village governments may now be exempt from the application of numerous state laws. Thus, the Legislative Leadership is concerned that a vast number of Alaska Natives are left unprotected by the State's uniform structure of laws, subject instead to no law at all or any number of rules set by 226 different village tribal organizations.[4]

The astonishing lack of governing rules is not limited to domestic relations, but may extend to all the "same inherent and delegated authorities available to other tribes." *John*, 982 P.2d at 753 (*quoting* 58 Fed. Reg. 54,366 (1993)).

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[3] Amici *curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.5

[4] *See, e.g.*, Letter from Alaska Attorney General Bruce Botelho to Representative Gail Phillips (Jan. 11, 1996), attached as an appendix to this brief ("Botelho Letter"), App. 9a-14a.

The Alaska Legislature will be the body forced to address the uncertainty and confusion that will inevitably result from the newly recognized sets of rules. Such uncertainty limits the Legislature's ability to regulate matters of vital importance to the citizens of Alaska and compromises its sworn duty to further the public interest. In addition to severely hindering the Legislature's role as policymaker for the State, the *John v. Baker* decision will inevitably spawn substantial litigation over precisely which state laws and regulations remain applicable to Native villages and which do not. Litigation over sovereign immunity status will drain the limited resources of both the State and Native communities, resources that could be used better for much-needed services.

Contrary to representations made to this Court by the State Department of Law in its *amici* filing, the Legislature is the body that most closely represents the views of the State's citizenry, and it does support the petition for certiorari. Mr. Baker has convincingly demonstrated why the decision below warrants review by the Court. *Amici* is filing separately to emphasize the difficulties that the decision poses for the State's lawmaking body and the Legislature's ability to fulfill its responsibilities to the Alaska citizens. As the branch of government most directly impacted by the decision, the Legislature can offer a unique perspective on both the Legislative history leading to this dispute and the likely consequences of a failure to review the lower court decision. For these reasons, the views of *amici* should further inform the Court's judgment as to whether to grant the petition.

ARGUMENT - REASONS FOR GRANTING THE PETITION[5]

The legal issues presented in this case transcend the State of Alaska and constitute precisely the sort of "important question of federal law" contemplated by Supreme Court Rule

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[5] Because of the shortness of this Brief, no summary of the argument is included.

10(c). The Alaska Supreme Court's interpretation of the inapplicability of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 ("ICWA"), to this case presents an issue of such wide-reaching national scale as to merit review by this Court. For example, the State of Alaska has cited several decisions on this issue by other state and circuit courts,[6] and the United States has weighed in as an *amicus curiae* in the case before the Alaska Supreme Court. Should the decision stand, the likely result is a significant departure from the states' traditional jurisdictional structure with respect to child custody determinations.

The Alaska Supreme Court ignored the plain meaning of the ICWA. Consistent with legislative history, Congress provided an exception to the application of ICWA in child custody disputes for "an award, ***in a divorce proceeding***, of custody to one of the parents." 25 U.S.C. § 1903(1) (emphasis added). The Alaska Supreme Court applied the exception, ignoring the fact that Mr. Baker and Ms. John had never been married and were not involved in a "divorce proceeding." *John*, 982 P.2d at 743. Congress' limitation of the exception to "divorce proceedings" should be read as it is written. Judicial expansion of the plain meaning contained in the statute is unnecessary and inappropriate. *Amici Curiae* agrees with Petitioner on this issue.

Amici Curiae also supports the Petitioner's argument that the Alaska Supreme Court has fundamentally misconstrued the application of both the Assistant Secretary of the Interior for Indian Affairs' published list of Native entities and the 1994 Federally Recognized Indian Tribe List Act, 25 U.S.C. § 479a – 479a-1, ("FRITLA"). Prior to 1993, no federal statute had ever recognized Native entities as "tribes" in Alaska, except for inclusion for specific and limited federal programs such as ICWA. In addition, no

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[6] See State of Alaska amici curiae brief at 9.

Native village had petitioned the Assistant Secretary for recognition as a tribe, as required by federal regulation.

To confer tribal status to a Native entity, the Secretary must have been delegated that authority explicitly by Congress. Legislative history confirms that the Assistant Secretary unilaterally usurped that authority in 1993. Congress did not explicitly delegate that authority, and it did not affirm the Assistant Secretary's actions in FRITLA. Congress has long recognized Alaska Native villages as "tribes" only for the limited purpose of receiving certain program benefits from the federal government. That inclusion cannot now be read to demonstrate Congress' sudden departure from historical treatment of Alaska Natives by naming them in the 1990's as fully sovereign "tribes."

Although the case at bar involves a custody disagreement between two unmarried Native parents, the implications of the Alaska court's ruling are far broader. Should Native residents of rural villages be considered "federally recognized tribes" for the purpose of the issuance of child custody decisions, then they may be "federally recognized tribes" for all other purposes, including sovereign immunity.

Newly conferred sovereign immunity could apply to all of the 226 Native villages in Alaska. In addition to domestic relations, a wide range of state laws and regulations could be virtually invalidated for a significant number of Alaska citizens. If the Alaska Supreme Court's ruling stands and Native villages are afforded tribal status for all purposes, sovereign immunity may exempt tribes from compliance with state law.

For example, currently on appeal before the Alaska Supreme Court is a case where the widow of a man working for the village of Mekoryuk IRA Council sought workers compensation benefits after he was killed in an accident while on the job. *Cigna Ins. Co. et al. v. Moses*, S-8908/8918 (Alaska Supreme Court 1999). The Alaska Workers

Compensation Board denied the widow benefits because Mekoryuk was found to be a federally recognized tribe possessing sovereign immunity, and was therefore immune from suit for workers compensation death benefits. In addition, the state Attorney General has acknowledged that some Native entities have already claimed sovereign immunity from application of the State's environmental protection laws. *See* Botelho Letter, App. 16a.

The decision of the Alaska Supreme Court undercuts a significant premise on which the Legislature has patterned its governance for much of the state and its citizens. The implications of this case for the lawmakers of this State are huge. From domestic relations to workers compensation to environmental protection and beyond, the Alaska Legislature has been placed in an untenable position. Sworn to protect the interests of the public in a fair and equitable manner, the lawmakers are now forced to reconsider the application of every law that has been considered and passed and each that will be.

CONCLUSION

For the reasons discussed above, and those stated in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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OFFICE OF THE ATTORNEY GENERAL

January 11, 1996

The Honorable Gail Phillips
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Dear Speaker Phillips:

At the conclusion of the Joint House-Senate Judiciary Committee hearing on tribal status held on December 4, 1995, I pledged to provide additional information about this important issue. This information is also being provided to legislators who did not participate in the committee hearing as a follow-up to my letter of November 27, 1995, on tribal status issues.

Let me emphasize once again that the decision by the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations. Instead, it was motivated by a commitment to working with Alaska villages to achieve a healthier, safer environment in which the community is an active participant

in solutions. Litigation over the issue of tribal status was viewed as a major impediment to this state-local partnership.

Nevertheless, the Administration's decision to not pursue the litigation over tribal status is also supported by events that, taken together, lead one to conclude that the probability of prevailing in the federal courts was extremely low. Very few human endeavors are static. In this instance, litigation over tribal status began in the 1980's because, in the absence of any clear federal expression that tribes existed in Alaska, the state was unwilling to accept each and every assertion of tribal status. As discussed further below, there has been extensive federal activity in the last two years that justified a fundamental reevaluation of the state's posture in the litigation.

THE FRAMEWORK FOR FEDERAL RECOGNITION OF TRIBES

Historically, the Alaska Supreme Court has held that for the most part, except far Metlakatla, no tribes exist in Alaska. The court extended sovereign immunity to Metlakatla in *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), holding:

> Once the [federal] executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the community is entitled to all of the benefits of tribal status.

569 P.2d at 163.

More recently, the court has declined to find sovereign immunity or has concluded that, if it did exist, it was waived by the tribe. These cases include *Nenana Fuel v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992); *Hydaburg Coop. Ass'n v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992); *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988); and *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983). No case, however, has questioned the fundamental holding of *Atkinson v. Haldane*.

Four events have occurred since the Alaska Supreme Court's last decisions in 1992 that suggest the court would, if presented the question, decide tribal status issues differently today, in keeping with its decision in *Atkinson*. Those events are: (1) the Secretary of Interior's tribal listings published in 1993 and 1995; (2) Congress' enactment of the Federally Recognized Indian Tribe List Act of 1994; (3) Judge H. Russel Holland's decision in *Native Village of Venetie v, State*, No. F86-0075 CIV (HRH), issued December 23, 1994, holding that the Native Village of Venetie Tribal Government is an Indian tribe under the common law criteria; and (4) Judge Holland's decision in the same *Venetie* case on the tribal status of Fort Yukon issued on September 20, 1995.

Department of Interior's 1993 and 1995 Tribal Lists

In 1993, the executive branch of the federal government took a significant step intended to remove any ambiguity as to the tribal status of certain Alaska Native entities. On October 21, 1993, the Secretary of Interior published a list of more than 220 Alaska Native villages identified as having the same status as tribes in the contiguous 48 states. The preamble to the 1993 list expressly declared:

> The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) and to *eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states*. Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental

> status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to the other tribes; and are subject to the same limitations imposed by law on other tribe.

58 Fed. Reg. 54365-54366 (Oct. 21, 1993) (footnote omitted; emphasis added).

The tribal list published by the Secretary on February 16, 1995, reinforces this intent. The preamble to the 1995 list states that it constitutes the list of "federally acknowledged tribes in the contiguous 48 states and in Alaska." 60 Fed. Reg. 9250 (Feb. 16, 1995). The preamble further points out that subsequent to the publication of the 1993 list, Congress enacted the List Act of 1994 in which "Congress confirmed the Secretary's authority and responsibility to establish a list of Indian tribes and mandated that he publish such a list annually." The updated 1995 list was published in response to that Congressional mandate. 60 Fed. Reg. at 9251.

The List Act of 1994

In late 1994, Congress was called upon to address the 1993 tribal list because of the Department of Interior's failure to include two tribes on the earlier list. One of the excluded tribes was the Central Council of Tlingit and Haida Indian Tribes of Alaska.

The result was enactment of the "Federally Recognized Indian Tribe List Act of 1994." Public Law 103-454; 25 U.S.C. 479a. In the List Act of 1994, Congress directed that the Secretary annually publish a list of federally recognized tribes; under the Act, once recognized, an Indian tribe may be terminated only by an act of Congress. Title II of the Act noted that the Secretary's 1993 list did not include the Central

Council and expressly reaffirmed the federal recognition of that tribe.

The House Natural Resources Committee report accompanying the legislation discusses the October 21, 1993, list of Alaska Native tribes and notes the continuing controversy over the existence of "Indian country" in Alaska. House Report No. 103-781; 1994 *U. S. Code Cong. and Adm. News*, p. 3768. The committee emphasized that the Act is neutral on the Indian country issue: "The Act merely requires that the Secretary continue the current policy of including Alaska Native entities on the list of Federally recognized Indian tribes which are eligible to receive services." *Id.* at 3771.

The December 23, 1994, Decision in the Venetie Case

On December 23, 1994, Judge Holland ruled that the Native Village of Venetie Tribal Government (encompassing the Native Village of Venetie and Arctic Village) is a tribe based on the federal common law criteria. Those criteria are: (1) the group is a group of Indians of the same or similar race; (2) it is united in a community; (3) it operates under one leadership or government; (4) it inhabits an area of some reasonable definition; and (5) it is the modern day successor to an historical sovereign entity which exercised at least minimal government functions. In applying these criteria to the evidence presented at trial, the court took a broad view of each one making it unlikely that any village would fail to meet the test.

The September 20, 1995, Decision in the Venetie Case (Fort Yukon)

The 1993 and the 1995 tribal lists, as well as the List Act of 1994, were considered by the U.S. District Court for Alaska when it was called upon to decide Fort Yukon's tribal status in the *Venetie* case. The state contested Fort Yukon's inclusion on the 1993 and 1995 lists because, in identifying the listed villages, the Secretary of interior had failed to follow the Department of Interior regulations necessary to achieve tribal recognition.

In a decision issued on September 20, 1995, the court rejected the state's argument. The court held that the Secretary of Interior has the power to recognize tribes as a result of the historical acquiescence of Congress. The federal regulations established a procedure for unrecognized tribes themselves to initiate proceedings to gain the Secretary's recognition. However, the court concluded, this is not the exclusive means by which a tribe may receive federal recognition, and "[t]he Secretary himself need not use this regulatory scheme, but may recognize a tribe due to his historically acquiesced power". Order, September 20, 1995, at 9. The court found that the ambiguity surrounding the status of the Alaskan entities on the tribal lists published by Interior from 1982 to 1988 was resolved by the publication of the October 21, 1993, list: "the executive's intent was clearly announced" on that date. *Id.* at 8. Thus, as of that date, the Native Village of Fort Yukon (as well as the other entities on the list) became a federally recognized tribe.

The court found support for its ruling on the tribal status of Fort Yukon in the List Act of 1994, stating:

> Congress repudiated a decision by the Secretary to remove two Alaskan tribes from the Secretary's 1993 list of recognized tribes. Congress did not, however, repudiate any other portion of the 1993 list. Congress actually referred to the 1993 list and ordered the two tribes returned to it. Tribe List Act, section 202(2). This leads to the conclusion that Congress approved of this list.

Order, September 20, 1995, at 10.

On October 20, 1995, the state moved for reconsideration of the court's decision, thus precipitating a careful policy review by Governor Knowles. The state's motion for reconsideration was later withdrawn. The plaintiffs also moved for reconsideration, arguing that Fort Yukon was a federally recognized tribe by virtue of its inclusion on the Department of Interior's tribal lists published from 1982 to

1988. On December 12, 1995, Judge Holland issued a decision reaffirming his previous ruling. The court stated that it had reconsidered its order of September 20 on the tribal status of Fort Yukon and concluded that it had made no error of fact or law in that order. The court reiterated its holding that as of October 21, 1993. Interior clearly declared the listed villages, including Fort Yukon, to be federally acknowledged tribes.

The Status of the "Indian Country" Issue

In two recent decisions issued by Judge Holland, the *Venetie* case and the *Kluti Kaah* case, the court held that ANCSA lands are not Indian country. Both of these cases have been appealed to the Ninth Circuit Court of Appeals. As I stated in my November 27, 1995, letter, the Knowles Administration will defend Judge Holland's decisions in the Indian country cases on appeal.

The *Venetie* Indian country case arose out of Venetie's effort to impose a business activities tax on a school construction project in the village. The ability of a tribe to tax depends on the tribe having a territory, *i.e.*, Indian country; over which it exercises jurisdiction. In August 1995, Judge Holland determined that the ANCSA lands owned by Venetie are not Indian country. Thus, the tribe cannot impose a tax on construction projects on ANCSA lands.

On November 28, 1995, Judge Holland ruled that the Kluti Kaah Native Village of Copper Center neither owns nor occupies land constituting Indian country. Therefore, Kluti Kaah lacks jurisdiction to impose a business activities tax on the section of the TransAlaska Pipeline System running through the area.

The essence of the Venetie and Kluti Kaah Indian country decisions is: (1) the test for Indian country is whether the land has been validly set apart for the use of Indians as such, under the superintendence of the federal government; (2) it is the tribe, not the land, that must be under federal superintendence; (3) following ANCSA, Alaska Native tribes are not subject to the degree of Congressional and Executive agency control that

evidences an intention that the federal government, rather than the state, be the dominant political institution in the area and are therefore not under the superintendence of the government; and (4) under the terms and structure of ANCSA, land conveyed to ANCSA corporations cannot be said to have been set aside for the use of Natives *as such*, and therefore is not Indian country.

While the decision to not pursue litigation over tribal recognition may focus the debate on the Indian country issue, it does not dilute the state's arguments on that issue. The federal court has already rejected arguments that tribal status establishes the existence of Indian country. As stated by the Department of Interior in its preamble to the 1995 list, "[i]nclusion on the list does not resolve the scope of powers of any particular tribe over land or non-members. It only establishes that the listed tribes have the same privileges, immunities, responsibilities and obligations as other Indian tribes under the same or similar circumstances . . ." 60 Fed. Reg. at 9251. The department then noted the opinion of the Solicitor of the Department of Interior, which concluded, construing general principles of federal Indian law and ANCSA,

> that ANCSA largely, controls in determining whether any territory still exists over which Alaska villages might exercise governmental powers. We also conclude that, notwithstanding the potential that Indian country still exists in Alaska in certain limited cases, Congress has left little or no room for tribes in Alaska to exercise governmental authority over land or nonmembers.

60 Fed. Reg. at 9251 n.1 (quoting Opinion of the Solicitor of the Department of Interior, Thomas Sansonetti, M-36975, at 108, January 11, 1993). *See also* 58 Fed. Reg. at 54366 n.1.

SUMMARY OF ISSUES ADDRESSED

During the December 4 hearing, additional information was requested on a number of issues. One of the items requested was a list of tribal powers. Many of the issues discussed below concern the scope of powers of a recognized tribe without Indian country (*i.e.*, tribal authority over internal affairs and domestic relations of tribal members; the treatment of tribes under the Clean Water Act; sovereign immunity; alcohol control; criminal law enforcement; Indian gaming; and fish and game management). Questions were also raised concerning the relationship of certain sections of the Statehood Act and the Alaska Constitution to tribal recognition; the federal statutes in which Alaska Native villages are defined as tribes for specific federal purposes; and the budgetary impacts of the tribal status litigation. These questions are discussed below as well.

Before going into those issues, however, let me reiterate what I stated in my letter of November 27 on tribal recognition generally. Tribal recognition is a federal, not a state, function. Tribal recognition means that Alaska's tribes are eligible to receive funding and services from the federal government, are able to set rules for tribal membership and the domestic relations of their own members, and are immune from suit. Governmental powers such as the right to tax, manage fish and game, and prosecute criminal cases are only applicable in Indian country; in other words, without Indian country, tribes have no jurisdiction to exercise such powers.

Tribal Authority over Internal Affairs

It is well established in federal Indian law that each tribe has the power to set its own membership criteria. Identification of a person as a member of an Indian tribe is an issue solely within the control of the tribe, and perhaps the individual. Tribes can also choose the structure within which they govern themselves. They may consider traditional tribal councils, IRA councils, or some form which combines traditional and modern factors. Traditional councils and IRA councils are not

subject to most state laws. Limitations on tribal action are governed by the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, and by Congress.

Child Protection - Indian Child Welfare Act Matters

The Division of Family and Youth Services, Department of Health and Social Services, responds to reports of harm regarding child abuse and neglect. Reports concerning Native children involve those living in villages, those living in urban areas, and those whose families travel back and forth. All of the villages listed in ANCSA have long been recognized as "Indian tribes" for purposes of the Indian Child Welfare Act (ICWA). *See* 25 U.S.C. 1903(8). Therefore, state acceptance that the listed Native villages are tribes does not change DHSS's longstanding practice of notifying tribes regarding Alaska Native children who come under the child protection statutes and the tribes' right to participate in state court child protection cases.

Not all tribes participate in state court ICWA cases involving their children. This happens for many reasons, including lack of funds, agreement with the state's position, and concern about lay representation instead of representation by counsel at state court proceedings.

Over the years the state has entered into formal agreements with a number of tribes regarding how they will interact in child protection cases, from the earliest reports through the completion of each case. Some tribes have not signed the agreements because they do not address tribal jurisdiction.

The issue of jurisdiction under ICWA bears some discussion. Through ICWA, "Congress created a comprehensive jurisdictional scheme for the resolution of custody disputes involving Indian children. This scheme expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction." *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 555 (9th Cir. 1991). For instance, under ICWA, jurisdiction is

exclusive in the tribe when the child custody proceeding involves Indian children who reside on their tribal reservations (exclusive jurisdiction requires proof of Indian country). In the case of Indian children who do not reside or are not domiciled on their tribe's reservation, the state court may exercise jurisdiction (at least) concurrent with the tribal court. However, the state court must refer the dispute to the tribal court unless good cause is shown for the retention of state court jurisdiction.

For tribes in some states, the exclusive and referral jurisdiction provisions of ICWA took effect automatically. However, tribes located within Public Law 280 states, which include Alaska, can invoke such jurisdiction only after petitioning the Secretary of the Interior and having been granted jurisdiction. Public Law 83-280 (commonly referred to as Public Law 280) gave enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction has previously vested only in federal and tribal courts. The civil portion of this statute is codified at 28 U.S.C. § 1360.

The Alaska Supreme Court and the federal courts are not in agreement on their interpretation and application of Public Law 280 in the ICWA context. The disagreement is over whether, under Public Law 280 and ICWA, the state has exclusive jurisdiction or concurrent jurisdiction over child custody determinations when the tribe has not petitioned the Secretary for reassumption of jurisdiction.

The Alaska Supreme Court has held that, under Public Law 280, tribal courts in Alaska have no child custody jurisdiction (and the state court has exclusive jurisdiction) unless the tribe has petitioned for reassumption of jurisdiction under ICWA. *Matter of F.P.*, 843 P.2d 1214 (Alaska 1992); *In re K.E.*, 744 P.2d 1173 (Alaska 1987); *Native Village of Nenana v. Department of Health and Social Serv.*, 722 P.2d 219 (Alaska 1986). In Alaska, only the Metlakatla Indian Community has petitioned for and been granted such jurisdiction.

The Ninth Circuit has held that under ICWA and Public Law 280, a tribe that has not petitioned for exclusive or referral jurisdiction may exercise concurrent jurisdiction with the state over child custody cases. *Village of Venetie I.R.A. Council*, 944 F.2d at 561-562. The *F.P.* case was decided after, and explicitly declined to follow, the Ninth Circuit's holding in *Village of Venetie* that any Alaska Native entity that proved itself a tribe retained inherent power over child welfare without going through the reassumption process.

Therefore, the state courts and agencies currently cannot, under Alaska law, agree that any Alaska Native tribe other than Metlakatla may assert exclusive jurisdiction under ICWA, 25 U.S.C. § 1911(a). Similarly, the Alaska courts cannot order the transfer of a case from state court to a tribal court, even though courts in other states have been transferring cases to tribal courts in Alaska for years.

Cultural Adoptions

The state currently issues substitute birth certificates when the appropriate parties attest that a cultural, or customary, adoption has taken place. Such adoptions, which are recognized under both federal and state law, are a traditional practice in which, for a variety of reasons, responsibility for a child is shifted from the natural parents to others. Before a substitute birth certificate can be issued, both natural parents must sign a state-provided form identifying the child and the child's tribe and affirming that an adoption has occurred under tribal custom. In addition, the governing body of the child's tribe must certify, in writing, that the adoption has followed tribal custom.

The legal effect of issuing tire substitute birth certificate is unclear, as is the legal effect of a cultural adoption in any given tribe. The state does not recognize tribal court adoptions because of the existing Alaska case law mentioned above, although the federal court has ordered the state to give full faith and credit to the adoption decrees of the Native Village of Venetie to the same extent it gives full faith and credit to

adoption decrees from other jurisdictions. *Native Village of Venetie I.R.A. Council v. State*, Memorandum of Decision, December 23, 1994. The court will be issuing a similar order regarding adoption decrees of the Native Village of Fort Yukon in the Fort Yukon portion of the *Venetie* case.

Marriage, Divorce, and Child Custody

A tribe's authority over the domestic relations of its members may prompt regulation of marriage and divorce and setting of tribal rules for each relationship. As tribes increasingly regulate the relationships of their members, they may perform more marriages and divorces and make more child custody decisions. Since Alaska is a Public Law 280 state, state courts have at least concurrent jurisdiction over family matters. This may lead to jurisdictional questions between the state courts and tribes which will need to be resolved.

The Clean Water Act and Indian Tribes

A question was raised concerning whether Alaska's tribes may be treated as "states" under the Clean Water Act. Under the longstanding federal interpretation of the Act, the answer is "no," except for the Metlakatla Indian Community, because "treatment as a state" is limited to federal Indian reservations.

The Federal Water Pollution Control Act, more commonly known as the Clean Water Act, contains two sections expressly dealing with Native Americans. Section 113, which was part of the 1972 Act, is entitled "Alaska village demonstration projects." It authorizes the EPA to enter into agreements with the State of Alaska to carry out safe water projects and pollution control projects in "Native villages of Alaska." "Village" is defined to mean:

> an incorporated or uncorporated community with a population of ten to six hundred people living within a two-mile radius.

33 U.S.C. § 1263(g).

Section 113 also authorizes federal executive agencies to coordinate with the State of Alaska and "appropriate Native organizations" to develop comprehensive sanitation programs in the Native villages. The term "Native organizations" is defined by reference to the Alaska Native Claims Settlement Act. *Id.* at (e). Thus, the Clean Water Act has long recognized Alaska Natives as such.

In 1987, Congress added section 518 to the Act. 33 U.S.C. § 1377. Entitled "Indian Tribes," section 518 authorizes the EPA to promulgate regulations specifying how the agency will treat tribes in the same manner in which it treats states.[1] The statute specifies those programs in which an Indian tribe can be treated as a state and also lists three criteria that must be met to attain such status. *Id.* at (e). Essentially, a tribe may develop water quality standards and issue effluent permits only if: (1) the tribe has a governing body carrying out substantial governmental duties; (2) the affected water resources are held by or for the tribe or a tribal member "or [are] otherwise within the borders of an Indian reservation"; and (3) the tribe has the technical and legal ability to carry out the mandates of the Clean Water Act.

Section 518 expressly refers to Alaska Natives in several contexts. Some funds are expressly reserved for "Alaska Native Villages as defined in [ANCSA]." 33 U.S.C. § 1377(c). Subsection (g) expressly disclaims any effect section 518 may have on "the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe . . ." Notwithstanding these two references, it is doubtful that section 518 applies to any Alaska Native tribe other than the Metlakatla Indian Community because, as explained below, the section appears

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[1] Similar language is found in the Clean Air Act and the Safe Drinking Water Act, 42 U.S.C. § 7601(d)(2)(B) and 42 U.S.C. § 300j-11(b)(1)(B) respectively.

to be limited to "reservations." *See* subsections (e)(2) and (h)(1).

Pursuant to section 518, EPA has promulgated "treatment as a state" regulations. One set of rules governs tribal establishment of water quality standards. 40 C.F.R. 131, 56 Fed. Reg. 64875-96 (1991). Another pertains to dredge and fill permits (wetlands). 40 C.F.R. parts 232 and 233, 58 Fed. Reg. 8171 (1993). Another pertains to financial grants. 40 C.F.R. parts 35 and 130, 54 Fed. Reg. 14354 - 60 (1989). The most recent publication of which we are aware "specifies how Tribes will be treated in the same manner as States for various provisions of the CWA." 40 C.F.R. 122, 123, 124 and 501, 58 Fed. Reg. 67966 (1993).

A reading of the most recent rule shows EPA only treats tribes as states on matters related to resources within a reservation[2]. Thus, because Metlakatla is the only reservation tribe in Alaska, the decision to no longer contest the tribal status of Alaska Native villages on the 1993 and 1995 lists of federally recognized tribes will have no impact under the Clean Water Act "treatment as a state" provisions.

Sovereign Immunity

One of the attributes tribes enjoy is sovereign immunity. *See, e.g., Native Village of Eyak v. GC Contractors*, 658 P.2d at 758. This immunity extends to corporations created by the tribe, such as those chartered under the Indian Reorganization Act. The most common Native corporations in the state currently are ANCSA corporations, which do not enjoy sovereign immunity because they are state-chartered corporations.

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[2] "EPA believes that it was the intent of Congress to limit Tribes to obtaining the status of Treatment in the Same Manner as a State for lands within the reservation. . . Tribes are limited to obtaining Treatment in the Same Manner as a State status for only water resources within the borders of the reservation over which they possess authority. . . " 58 Fed. Reg. 67970.

Sovereign immunity bars suits against tribes. It also bars cross-claims and counterclaims. *United States v. U. S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940). It does not bar suits against individual tribal officials. Congress can waive the tribes' sovereign immunity, but the waiver must be clearly expressed and strictly construed. *See Santa Clara Pueblo v, Martinez*, 436 U.S. 49 (1978); *Turner v. U.S.*, 248 U.S. 354 (1919).

The extent to which and manner in which tribes can waive their sovereign immunity is less clear. The Alaska Supreme Court has held that tribes can waive their sovereign immunity by contract. *Nenana Fuel v. Native Village of Venetie*, 834 P.2d at 1233; *Native Village of Eyak v. GC Contractors*, 658 P.2d at 759. However, federal law requires that to waive immunity by contract in matters relating to trust property, tribes must receive Secretarial or Congressional consent.

With respect to environmental laws, the federal courts generally hold that Congress has abrogated tribal sovereign immunity when the United States seeks to enforce federal environmental laws against tribes. Therefore, a tribe operating a business would not be immune from federal environmental standards and requirement. However, state enforcement of its standards and requirements against such an entity may be problematic. A few Native groups in Alaska have claimed" sovereign immunity in response to efforts by ADEC to enforce the state's "little superfund law," AS 46.03. This could be an area of dispute with tribes in the future.

Alcohol Control

Under state law, both Native and non-Native residents of rural villages have been delegated significant authority to control the use of alcohol. AS 04.11.490--04.11.506. In addition to adopting restrictions on alcoholic beverages, "local governing bodies" may protest the issuance, transfer, relocation, or renewal of liquor licenses. Currently, the Alcoholic Beverage Control Board regulates the licensing of establishments that manufacture, sell, of otherwise deal in

alcoholic beverages, including those located within Native villages.

If a particular tribe were recognized as having control over an area of Indian country, that tribe could adopt alcohol ordinances for enforcement in its tribal courts. In addition, the tribe could choose to adopt ordinances regulating the sale, importation, or possession of alcoholic beverages within its Indian country through a federal process instead of the state process, thereby making the ordinance enforceable by a federal court. See 18 U.S.C. § 116. Otherwise, federal and state laws concurrently govern the control and regulation of alcoholic beverages in Indian country. *Rice v. Rehner*, 463 U.S. 713 (1983),

Criminal Law Enforcement

Tribal recognition alone does not confer tribal jurisdiction over any criminal act. The criminal jurisdiction of a tribe is limited to the territory it controls. Without territorial jurisdiction, *i.e.*, Indian country, a tribe has no criminal jurisdiction.

A tribe can exercise criminal jurisdiction over its members within Indian country. Where Indian country exists, tribes have the power to make their own criminal laws and enforce them in tribal counts unless Congress limits that power. *U.S. v. Wheeler*, 435 U.S. 313 (1978). The Indian Civil Rights Act, 25 U.S.C. § 1302, limits how tribes exercise their powers of self-government. Tribes cannot exercise criminal jurisdiction over non-members unless Congress expressly grants that power. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191. (1978).

Generally states have no criminal jurisdiction over tribal members within Indian country. *Rice v. Olson*, 324 U.S. 786, 789 (1945); *Worcester v. Georgia*, 31 U.S.(6 Pet.) 575 (1832). However, in 1958 Congress gave the State of Alaska "jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . ." 18 U.S.C. § 1162, Pub. L. 83-280. As a Public Law 280 state, Alaska has jurisdiction

over all crimes committed in Indian country. Although 18 U.S.C. § 1162 refers to the state having "exclusive jurisdiction" within Indian country, courts have recognized concurrent tribal jurisdiction over minor crimes.

Indian Gaming

Tribal recognition does not impact Indian gaming in Alaska. The federal Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-21 (IGRA), permits recognized Indian tribes to conduct Class III gaming on "Indian land" if such gaming is otherwise legal in the state, upon negotiation of a gaming compact that is approved by the federal Indian Gaming Commission. Class III gaming consists of all casino games except bingo, pull-tabs, and traditional social games of chance. Without Indian land, a tribe does not have the necessary territorial jurisdiction to conduct gaming. In addition, under current state law casino gaming is illegal and thus not allowed to Natives or non--Natives in Alaska.

Fish and Game Management

State recognition of Alaska tribes does not affect fish and game management. Indian rights to manage fish and game originate from three sources: (1) reservation status of land; (2) off-reservation treaty rights; and (3) federal preemption of state regulation. Only one reservation exists in Alaska (Metlakatla), and no treaties exist between the federal government and Alaska Natives. Therefore, any Native rights to manage fish and game can only be based on federal statutes preempting state control. In Alaska, ANILCA grants rural residents, both Native and non-Native, a priority for the taking of fish and wildlife on public lands for subsistence uses. Tribal recognition does not impact this individual federal right.

Alaska Native Villages Defined as Tribes for Specific Federal Purposes

Although blanket federal recognition of Alaska Native villages as tribes did not occur until the October 21, 1993, listing, Congress has repeatedly chosen to treat Alaska Native villages as tribes for specific purposes.

The following statutes are examples of instances in which Alaska Native villages have been included in the statutory definition of Indian tribes or where Native villages have been included along with tribes in definitions of units of government affected by statutes (citations are primarily to the definition sections involved:

5 U.S.C. § 3371. Provisions for personnel assignments to and from states.

15 U.S.C. § 637. Aid to small businesses.

16 U.S.C. § 470w. Assistance in the conservation of historic sites, buildings, objects, and antiquities,

16 U.S.C. § 470bb. Programs for archaeological resources protection.

20 U.S.C. § 3232. Assistance in bilingual education programs.

20 U.S.C. § 4402. Assistance in development of American Indian, Alaska Native, and Native Hawaiian culture and art.

23 U.S.C. § 101. Assistance provided for public roads under the program for federal aid for highways.

25 U.S.C. § 472a. Included as a "tribal organization" in applying Indian preference laws.

25 U.S.C. 1452. The Indian Financing Act of 1974.

25 U.S.C. § 1603. The Indian Health Care Amendments of 1980.

25 U.S.C. § 1622. Eligibility of tribal organizations for health care grants and contracts.

25 U.S.C. § 1903. The Indian Child Welfare Act.

25 USC. §§ 2011 and 2019. Establishing a new national Indian education system.

25 U.S.C. § 2401. Indian alcohol and substance abuse prevention and treatment.

26 U.S.C. § 4225. Exemption of articles manufactured or produced by Indians.

29 U.S.C. § 706. Provision of vocational rehabilitation and other rehabilitation services.

29 U.S.C. § 1671. Employment and training programs for Native Americans and migrant and seasonal farm workers.

31 U.S.C. § 7501. The single audit requirement for state and local governments.

42 U.S.C. § 628. HHS payments to Indian tribal organizations for child welfare services.

42 U.S.C. § 1471. USDA financial assistance for farm housing.

42 U.S.C. § 2991b. HHS financial assistance for Native American projects under the HHS Native American Program, administered by ANA.

42 U.S.C. § 2992c. RHS program for Native Americans.

42 U.S.C. § 3002. HHS programs for older Americans.

42 U.S.C. § 5061. HHS programs for administration and coordination of domestic volunteer services.

42 U.S.C. § 5122. Provision of federal assistance to other levels of government for disaster relief.

42 U.S.C. §§ 5302 and 5316. Assistance in providing public facilities under the Housing and Urban Development Act of 1968.

42 U.S.C. § 6707. Grants four public works projects.

42 U.S.C. § 6723. Assistance under anti-recession provisions for public works employment.

42 U.S.C. § 5903. Assistance in the planning and administration of solid waste disposal.

42 U.S.C. § 8803. Assistance in the development of biomass energy and alcohol fuels.

42 U.S.C. § 9601. Special programs and assistance relating to hazardous substance releases, liability and compensation.

42 U.S.C. § 10101. Assistance in handling nuclear waste.

42 U.S.C. § 11472. Set-asides to assist in education, training, and community services for the homeless.

Section 4, Alaska Statehood Act and Article XII, Section 12, Alaska Constitution

A member of the public who testified at the hearing inquired about the relationship between section 4 of the Statehood Act and article XII, section 12 of the Alaska Constitution, and the tribal status and Indian country issues.

Both section 4 of the Alaska Statehood Act (Pub. L. 85-508, 72 Stat. 339 as amended) and article XII, section 12 of the Constitution of Alaska provide that the state and its people "forever disclaim all right and title to any lands or other property" owned or subject to disposition by the United States, and to any lands or other property, including fishing rights, the right or title to which may be held by or in trust for any Indians, Eskimos, or Aleuts. Both sections further provide that all such property shall be subject to the absolute control, jurisdiction, and right of disposal of the United States except as Congress otherwise provides.

These provisions have no relevance in the debate over tribal status; they do not address the issue. The Statehood Act expressly states that it shall not be construed to "recognize, deny, enlarge, impair, or otherwise affect" claims against the United States or to establish the validity or invalidity of any such claim. Tribes are not mentioned in either provision, and these sections have not been relied on by tribal advocates in the cases now in the federal courts. These provisions are cited as justification for permitting Native selections of state-selected lands under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, and exempting undeveloped ANCSA land from taxation, but beyond that, they are not germane to the current debates over tribal status and Indian country.

Budgetary Impacts of Tribal Status Litigation

Concern was expressed by a legislator that the Department of Law may have made representations about litigating the tribal status issue in order to secure funding for litigation.

The Department of Law made no commitment in any budget document to litigate the tribal status issue. The department has in the past sought CIP funding to litigate other issues that concern or involve the interests of Alaska Natives. These include the Endangered Species Act cases, the fishing treaty cases, the submerged lands cases, and various ANILCA challenges, most notably *Katie John v. United States* and *Totemoff v. State*, This litigation continues. *See, e.g.*, CP Descriptions for FY 1995 and FY 1996.

CONCLUSION

Some participants in the December 4, 1995, hearing[3] characterized the decision to no longer contest the tribal status

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[3] During the hearing a legislator requested a copy of the report entitled *Legal Status of the Alaska Natives* by Robert L. Price (July 30, 1982; 1983 and 1989 supplements). Please let my office know if you would like a copy.

of Alaska Native villages as a wholesale reversal of prior executive and legislative branch policies and an abdication of responsibility. This view does not reflect the true complexity of the state's dealings with tribes.

Successive state administrations have recognized the need to work with tribal entities in various contexts. For example, as discussed earlier, since the early 1980's the state has entered into memoranda of agreement with tribes implementation of the Indian Child Welfare Act. Governor Cowper's Administrative Order No. 123 acknowledged tile existence of tribes in Alaska. Although Governor Hickel later revoked Administrative Order 123 and declared that the state "opposes expansion of tribal governmental powers and the creation of `Indian Country' in Alaska," his administration did not oppose tribal status in a wholesale fashion. Thus, my predecessor chose not to contest the tribal status of the Kluti Kaah Native Village of Copper Center in litigation over the tribe's right to impose a tax on the TransAlaska Pipeline System.

Since 1985 the legislature itself has authorized state aid to Alaska Native village councils to the extent they waive immunity from suit for claims arising out of activities related to the payment. AS 29.60.140.

Finally, while people may disagree with the wisdom: of this policy change, there should be no doubt that the Governor has the authority to adopt and implement the tribal status policy for his administration, just as his predecessors have done. As attorney general, I will continue to provide the best legal advice available to the state's chief executive and to support his policy choices to the extent they are consistent with the law. In this instance, I have no reservation in doing so.

Very truly yours,

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January 21, 2000

Theodore W. Popely
Counsel for the Senate and House Majority
Alaska State Legislature State Capitol, Room 116
Juneau, Alaska 99801

Re: *Baker v. John*

Petition for Certiorari No. 99-973

Dear Mr. Popely:

Mr. John Baker, the petitioner in the above-captioned action, consents to the Honorable Drue Pearce, president of the Alaska Senate, and the Honorable Brian Porter, speaker of the Alaska House of Representatives, filing a brief in the above-captioned action as amici curiae in support of the petitioner. Mr. Baker also supports President Pearce and Speaker Porter's motion to file their brief out of time.

Sincerely,

Donald Craig Mitchell
Counsel of Record for Petitioner John Baker

cc: Andrew Harrington Counsel of Record for Respondent